Supreme Court, U.S.
FILED
FEB 7 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-453

In The

Supreme Court of the United States

October Term, 1989

METRO BROADCASTING, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

RONALD A. ZUMBRUN
ANTHONY T. CASO
*SHARON L. BROWNE
*Counsel of Record
Pacific Legal Foundation
2700 Gateway Oaks Drive,
Suite 200
Sacramento, California 95833
Telephone: (916) 641-8888

Attorneys for Amicus Curiae, Pacific Legal Foundation

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES CITED iii

IDENTITY AND INTEREST OF AMICUS 1

OPINION BELOW 2

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. THE STRICT SCRUTINY STANDARD OF REVIEW SHOULD APPLY TO ALL RACE-BASED PROGRAMS 5

A. Strict Scrutiny Is the Appropriate Standard of Review for Race-Conscious Programs 5

B. Federally Approved Race-Conscious Programs Should be Examined Under the Strict Scrutiny Standard 7

II. THERE IS NO COMPELLING GOVERNMENTAL INTEREST TO JUSTIFY A RACE-CONSCIOUS CLASSIFICATION 9

A. The Minority Preference Constitutes a Classification Based on Race 9

B. Without Evidence of Past Discrimination There Is No Compelling Governmental Interest to Justify a Race-Conscious Plan 12

1. The Congressional Action Relied on Is Wholly Inadequate to Justify a Race-Conscious Plan 12

TABLE OF CONTENTS – Continued

Page

2. FCC's Race-Based Preference Policy Is the Result of Judicial Decision-Making 15

C. Program Diversity Is Not a Compelling Governmental Interest Justifying a Race-Based Preference Program 17

III. THE RACE-BASED PREFERENCE POLICY IS NOT NARROWLY TAILORED 20

CONCLUSION 22

TABLE OF AUTHORITIES CITED

Page

CASES

Associated Press v. United States, 326 U.S. 1 (1945) 18

Board of Education v. Brown, 347 U.S. 483 (1954) 7

Bolling v. Sharpe, 347 U.S. 497 (1954) 7, 8

City of Richmond v. J. A. Croson Company, ___ U.S. ___, 102 L. Ed. 2d 854 (1989) ..... *passim*

Federal Communications Commission v. National Citizen's Committee for Broadcasting, 436 U.S. 775 (1978) 17

Fullilove v. Klutznick, 448 U.S. 448 (1980) ..... *passim*

Garrett v. Federal Communications Commission, 513 F.2d 1056 (D.C. Cir. 1975) 10, 15, 16, 18

Korematsu v. United States of America, 323 U.S. 214 (1944) 6, 7

Loving v. Virginia, 338 U.S. 1 (1967) 20

Office of Communication of the United Church of Christ v. Federal Communications Commission, 707 F.2d 1413 (D.C. Cir. 1983) 18

Regan v. Taxation with Representation, 461 U.S. 540 (1983) 9, 18

Regents of the University of California v. Bakke, 438 U.S. 265 (1978) 7, 17, 18

Schneider v. Rusk, 377 U.S. 163 (1964) 8

Shapiro v. Thompson, 394 U.S. 618 (1969) 8

Steele v. Federal Communications Commission, 770 F.2d 1192 (D.C. Cir. 1985) 15, 19

TV 9, Inc. v. Federal Communications Commission, 495 F.2d 929 (D.C. Cir. 1973) 10, 15, 18

TABLE OF AUTHORITIES CITED (Cont.)

Page

Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) 9

West Michigan Broadcasting Co. v. Federal Communications Commission, 735 F.2d 601 (D.C. Cir. 1984) 11, 12, 17, 20

Winter Park Communications, Inc. v. Federal Communications Commission, 873 F.2d 347 (D.C. Cir. 1989)..... *passim*

Wygant v. Jackson Board of Education, 476 U.S. 267 (1986) 6, 7, 20, 21

ADMINISTRATIVE DECISION

Metro Broadcasting, Inc., 2 FCC Rcd 1474 (1987) 3

STATUTES

47 U.S.C. § 307(a) 3

§ 309(e) 3

REGULATIONS

52 Fed. Reg. 596 (1987) 10

52 Fed. Reg. 597..... 12

MISCELLANEOUS

H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 43 (1982) 12

No. 89-453

In The

Supreme Court of the United States

October Term, 1989

METRO BROADCASTING, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

IDENTITY AND INTEREST OF AMICUS

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of petitioner, Metro Broadcasting, Inc. (Metro). Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

Amicus is submitting this brief because it believes its public policy perspective and litigation experience opposing race-based decisions by government agencies will provide an additional viewpoint with respect to the constitutional issues presented. PLF has participated in numerous cases involving issues arising under the Fifth and Fourteenth Amendments to the United States Constitution. Amicus believes the lower court's opinion poses a serious threat to the integrity of the government's broadcast licensing procedures. Allowing the Federal Communications Commission (FCC) to apply race preferences in comparative licensing hearings violates fundamental notions of fairness.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 873 F.2d 347 (D.C. Cir. 1989).

STATEMENT OF THE CASE

This case presents the issue of whether the equal protection component of the Fifth Amendment to the United States Constitution tolerates race preferences in comparative licensing proceedings for new broadcast stations.

The issue arose when Metro Broadcasting filed an application for a construction permit for a new television station in the Orlando, Florida, area. Rainbow Broadcasting Company (Rainbow) filed a competing application. FCC held a comparative hearing pursuant to Section 309(e) of the Communications Act of 1934, as amended. 47 U.S.C. § 309(e).

In comparative licensing proceedings for new broadcast stations, FCC is required to grant licenses as "public convenience, interest, or necessity" requires. 47 U.S.C. § 307(a). To meet this mandate, FCC has adopted certain factors which must be considered in comparative hearings. The qualitative attributes or enhancement factors include the integration of the owners into the management, local involvement of the owners, and minority participation in ownership. The two most important factors are local residence and minority status. Metro prevailed on the local residence and civil participation attributes. However, Rainbow had a greater minority owner/management integration. In awarding the license to Rainbow, FCC on remand acknowledged that, "absent credit for its minority and female integration, Rainbow would lose its qualitative advantage over Metro." *Metro Broadcasting, Inc.*, 2 FCC Rcd 1474, 1478 (1987).

The Court of Appeals for the District of Columbia Circuit upheld the granting of a minority ownership preference to Rainbow against a constitutional attack.

SUMMARY OF ARGUMENT

FCC's policy of awarding substantial preference to minority ownership in comparative hearing proceedings violates nonminority individuals' constitutional rights.

As recognized by Justice Powell, "this Court has never approved race-conscious remedies absent judicial, administrative, or legislative findings of constitutional or statutory violations." *Fullilove v. Klutznick*, 448 U.S. 448, 497 (1980) (Powell, J., concurring). In this case there was no finding of prior discrimination and the policy was applied solely to foster program diversity. Absent such a finding, nonminorities' constitutional rights to be treated as individuals are impermissibly infringed.

Because there is no finding of prior discrimination in the broadcast industry, the race-based preference policy below must be justified by some other compelling governmental interest. Neither underrepresentation of minority ownership in the broadcast industry nor program diversity provides FCC a goal important enough to warrant use of a race classification. Nor is FCC's program "narrowly tailored." First, it is not linked to identified discrimination and, second, it is clear that FCC did not consider whether alternative remedies might serve the FCC's purpose. Accordingly, FCC's minority preference scheme cannot withstand the strict scrutiny analysis

urged by amicus to test compliance with equal protection guarantees.

Absent a finding of prior discrimination, a government imposed racial preference is clearly an arbitrary and capricious act and itself constitutes invidious discrimination. The equal protection guaranty protects individual rights and does not countenance group preference merely to obtain racial balance. For these reasons, the judgment below must be reversed.

ARGUMENT

I

THE STRICT SCRUTINY STANDARD OF REVIEW SHOULD APPLY TO ALL RACE-BASED PROGRAMS

The constitutional challenge to FCC's race-based preference in the comparative broadcasting licensing proceedings has been brought under the implied equal protection guarantee of the Fifth Amendment. As discussed below, this program, as well as all race-conscious programs, should be reviewed under the strict scrutiny test.

A. Strict Scrutiny Is the Appropriate Standard of Review for Race-Conscious Programs

Amicus believes that all remedies based on a racial classification are subject to the most searching examination. This includes a race-conscious program approved by the federal government or a state or a local government.

The strict scrutiny standard has been traditionally used when examining "suspect" classifications based on race or national origin. The purpose of strict scrutiny is to

"smoke out" illegitimate uses of race by assuring that the governmental body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *City of Richmond v. J. A. Croson Company*, ___ U.S. ___, 102 L. Ed. 2d 854, 881-82 (1989) (plurality opinion of O'Connor, J.). Strict scrutiny analysis requires the satisfaction of two prongs. First, any racial classification must be justified by a compelling governmental interest and, second, the means chosen by the government to effectuate its purpose must be narrowly tailored to meet that goal. *Wygant v. Jackson Board of Education*, 476 U.S. 267, 274, 285 (1986); *Croson*, 102 L. Ed. 2d at 881-82 (plurality opinion).

The decision in *Korematsu v. United States of America*, 323 U.S. 214 (1944), was the start of equal protection constitutional analysis. In that case, the Court upheld, by a six to three vote, the wartime restrictions on residents of Japanese origin but indicated that classifications based on race or national origin would not be consistent with the principles of the equal protection guarantee absent compelling governmental interest. This opinion established the basis for the standard of review of classifications based on race:

> "It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can." *Korematsu*, 323 U.S. at 216.

This Court has not swayed from this standard of review when confronted with a classification based on race. In *Wygant*, this Court stated: "Racial, and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *Wygant*, 476 U.S. at 273 (quoting *Regents of the University of California v. Bakke*, 438 U.S. 265, 291 (1978) (opinion of Powell, J., joined by White, J.)).

Recently, in *Croson*, a majority of this Court held that race-based programs are suspect classifications subject to strict scrutiny by the courts. Plurality opinion of Justice O'Connor, joined by Justices White, Kennedy, and the Chief Justice. 102 L. Ed. 2d at 882 (Scalia, J., concurring at 899).

B. Federally Approved Race-Conscious Programs Should be Examined Under the Strict Scrutiny Standard

Amicus believes that the same analysis should apply regardless of whether a constitutional challenge to a race-conscious program is brought under the Fifth Amendment due process guarantee or the Fourteenth Amendment equal protection guarantee. The guaranty of equal protection prohibits the government from discriminating between individuals or groups on an illicit basis. This is consistent with this Court's earlier cases recognizing that there are no significant distinctions between such limitations on the federal government and limitations on a state and local government.

In *Bolling v. Sharpe*, 347 U.S. 497 (1954), a companion case to *Board of Education v. Brown*, 347 U.S. 483 (1954), the

Court explained the relationship of the Fifth and Fourteenth Amendments:

> "The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the States. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process." 347 U.S. at 499.

The Court then invalidated segregation of public schools in the District of Columbia finding that racial segregation violates the Due Process Clause.

In *Shapiro v. Thompson*, 394 U.S. 618 (1969), this Court was confronted with the imposition of residency requirements for welfare eligibility which had been authorized by Congress in Section 402(b) of the Social Security Act. Writing for the majority, Justice Brennan ruled first, that the state residency requirements impinged upon the fundamental right to travel and were not supported by a compelling state interest, second, that "Congress may not authorize the States to violate the Equal Protection Clause," *id.* at 641, and third, that the District of Columbia's residency requirement was a "discrimination . . . so unjustifiable as to be violative of due process." *Id.* at 642 (quoting *Schneider v. Rusk*, 377 U.S. 163, 168 (1964)). The equal protection test stated in *Shapiro* required the application of the strict scrutiny standard of review whenever

a classification impinged upon a suspect class or upon a fundamental interest. 394 U.S. at 629.

In *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), this Court reaffirmed: "This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to the equal protection claims under the Fourteenth Amendment." *Id.* at 638 n.2.

Again in *Regan v. Taxation with Representation*, 461 U.S. 540, 542 n.2 (1983), this Court stated: "The Due Process Clause imposes on the Federal Government requirements comparable to those that the Equal Protection Clause of the Fourteenth Amendment imposes on the States."

Amicus urges this Court to adopt one standard in examining all race-based preference programs. A strict scrutiny standard of review would be in complete harmony with the goal of a color-blind society free from racial bias.

II

THERE IS NO COMPELLING GOVERNMENTAL INTEREST TO JUSTIFY A RACE-CONSCIOUS CLASSIFICATION

A. The Minority Preference Constitutes a Classification Based on Race

In this case, the court below erred in its examination of the race-based preference policy adopted by FCC in its comparative hearing process. The race-based preference is designed to achieve diversity in broadcast programming by fostering an increase in the number of broadcast facilities owned by minorities. This policy is implemented

through granting of minority preference in comparative licensing proceedings for broadcast stations. 52 Fed. Reg. 596 (1987).

The minority preference at issue here had its origin in *TV 9, Inc. v. Federal Communications Commission*, 495 F.2d 929 (D.C. Cir. 1973), in which the court stated: "We hold . . . that when minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded." The court concluded that it could be assumed that minority ownership would foster diversity of programming. *Id.* at 938.

Subsequently, in *Garrett v. Federal Communications Commission*, 513 F.2d 1056 (D.C. Cir. 1975), the court again addressed minority ownership and stated that the "entire thrust of *TV 9* is that black ownership and participation together are themselves likely to bring about programming that is responsive to the needs of black citizenry and that 'reasonable expectation' without 'advance demonstration' gives them relevance." 513 F.2d at 1063.

In response to the circuit court's mandates in *TV 9* and *Garrett*, FCC concluded that minority ownership and participation should receive credit in the comparative hearing process as one of several factors. 52 Fed. Reg. at 598. Because of the weight given the minority ownership preference, the court below noted that it can "tip the balance in some cases." *Winter Park Communications, Inc. v. Federal Communications Commission*, 873 F.2d 347, 353 (D.C. Cir. 1989). That is precisely what occurred in the case at bar. On remand, the commission found that Rainbow's minority ownership was the dispositive factor in it being awarded the broadcast license. *Id.* at 351.

Clearly, the race-based preference program in comparative hearings operates against nonminorities and in favor of minorities. It therefore constitutes a classification based on race and "must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." *Fullilove*, 448 U.S. at 491 (opinion of Burger, C. J.).

Yet, the lower court without critically examining the validity of the race-based preference, merely tracks the reasoning and language of an earlier decision, *West Michigan Broadcasting Co. v. Federal Communications Commission*, 735 F.2d 601, 613 (D.C. Cir. 1984). *West Michigan* held that FCC's use of an enhancement factor for minority ownership passed constitutional muster. 873 F.2d at 349. The court relied on only two factors. First, that consideration of minority status was but "one factor in a competitive multi-factor selection system that is designed to obtain a diverse mix of broadcasters," 735 F.2d at 613. Finding support in Justice Powell's approach in *Bakke*, the Court stated that FCC's use of a minority preference furthered the goal of attaining the First Amendment value "that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *West Michigan*, 735 F.2d at 614 (footnote omitted) (quoting 1965 Policy Statement, 1 FCC 2d 393, 394 n.4 (1965)). And second, relying on *Fullilove*, the *West Michigan* court found it unnecessary to undertake a complete review of FCC's preference policy because "[a]ny doubt concerning the constitutionality of the FCC's consideration of minority status was ended by Congress' approval of the Commission's goals and means." 735 F.2d at 615; *Winter Park*, 873 F.2d at 355.

As discussed below, for this race-based preference in comparative hearings to be valid, it must satisfy both prongs of the "strict scrutiny" test and this it cannot do.

B. Without Evidence of Past Discrimination There Is No Compelling Governmental Interest to Justify a Race-Conscious Plan

Croson requires that a race-conscious plan contain a factual predicate that identifies past discrimination sufficient to establish a compelling governmental interest. *Id.* at 889. As this Court observed, "a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy." *Id.* at 885. Yet this is precisely the kind of "generalized assertions" the court below relies on to validate this race-based preference. *Winter Park*, 873 F.2d at 353.

1. The Congressional Action Relied on Is Wholly Inadequate to Justify a Race-Conscious Plan

FCC has cited congressional statements that minority underrepresentation was the result of past discrimination, 873 F.2d at 353. These statements include a 1982 conference report suggesting that minority underrepresentation in broadcasting is merely part of the larger phenomenon of minority underrepresentation. H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 43 (1982); *West Michigan*, 735 F.2d at 615-16. *See also* 52 Fed. Reg. 597. Additional acts of Congress include the 1988 and 1989 Appropriations Act which contained language directing

FCC to reinstate prior policy with respect to granting minority preferences.

The lower court suggested that these congressional acts are ample grounds for treating FCC's preference policy as if it had been adopted by Congress directly. Thus, relying on the reasoning of *Fullilove*, the lower court did not make a searching inquiry into the purpose of this race-conscious program.

Reliance by the lower court on *Fullilove* is misplaced. In *Fullilove*, a fragmented Court examined the scope of Congress' power to adopt a race-conscious program under Section 5 of the Fourteenth Amendment. The "set-aside," provision of the Public Works Employment Act of 1977 required that 10% of the federal funds granted for local public works projects be allocated to businesses owned and controlled by specified racial and ethnic minorities. Without employing any traditional equal protection review, this Court validated the set-aside as a federal regulation to remedy the effects of past and present racial discrimination and to prevent the recurrence of that discrimination. Chief Justice Burger, writing for the Court, concluded that Congress had constitutional authority under the spending and commerce powers, as well as under Section 5 of the Fourteenth Amendment to enact remedial legislation directed at racial discrimination. He found that over the past two decades Congress' efforts to solve problems associated with discrimination against minority businesses provided an "abundant historical basis" upon which it could have "reasonably determined" that such action was necessary to ensure "equal protection of the laws." In examining whether the use of racial and ethnic criteria in the set-aside was a

valid means to that constitutionally valid objective, he stated that "the need for careful judicial evaluation to assure that any congressional program that employs racial or ethnic criteria . . . [to remedy] . . . the present effects of past discrimination is narrowly tailored to the achievement of that goal." *Fullilove*, 448 U.S. at 479.

It is clear that the underlying logic in *Fullilove* supports a heightened scrutiny review of all race-based programs. Justice Powell, who joined Chief Justice Burger's opinion, wrote separately. He contended that the set-aside provision had to be judged by "the most stringent level of review" because it employed a racial classification. 448 U.S. at 496 (Powell, J., concurring). He asserted that the challenged provision could be upheld only if it constituted "a necessary means of advancing a compelling governmental interest." *Id.*

It is amicus' position that the *Fullilove* decision is not dispositive in the case at bar. *Fullilove* focused on race-based remedial measures undertaken by Congress after Congress had spent years attempting to address the problems of minority business enterprises. The justices looked to a variety of congressional reports, hearings, and legislation relating to the problems. The race-based preference policy at issue here was the concoction of two judicial decisions. It was a federal agency that adopted the policy without congressional findings of past discrimination. Additionally, what little action Congress took occurred years after the policy had been in place.

It is clear that Congress did not examine whether the use of a race classification was a valid means to increase minority ownership in the broadcast industry. This lack

of examination was recognized in *Steele v. Federal Communications Commission*, 770 F.2d 1192, 1198 (D.C. Cir. 1985), in which the court found that examining FCC's preferential treatment program is not a simple task because "[f]irst, the assumptions and premises themselves have never been critically examined by the courts, Congress, or the Commission. Second, to the extent that they are discernible, they run counter to the fundamental constitutional principle that race, sex, and national origin are not valid factors upon which to base government policy." 770 F.2d at 1198.

In sum, because Congress has never made findings of prior discrimination in the broadcasting industry the congressional action in this case is wholly inadequate to justify the race-based preference policy of FCC.

2. FCC's Race-Based Preference Policy Is the Result of Judicial Decision Making

FCC offers no proof of particular discrimination in the broadcast industry to justify a race-conscious program. FCC's policy was in fact the result of judicial decision making in *TV 9* and *Garrett*. In those cases the circuit court overturned FCC's decision to refuse to award a preference license to minority applicants. In *TV 9* the court stated that minority ownership should be given a preference if black ownership and participation together are likely to bring about programming that is responsive to the needs of black citizenry. *TV 9*, 495 F.2d at 938. In *Garrett*, the court stated that the minority applicant does not have to present evidence that program diversity will be achieved because it can be inferred that

diversity of station ownership will bring about diversity of programming. *Garrett*, 513 F.2d at 1063.

In response to these decisions, FCC developed a policy statement. In the Minority Ownership Report of its Minority Ownership Task Force, FCC stated:

> " 'Despite the fact that minorities constitute approximately 20 percent of the population, they control fewer than *one percent* of the 8500 commercial radio and television stations currently operating in this country.
>
> " 'Acute underrepresentation of minorities among the owners of broadcast properties is troublesome because it is the licensee who is ultimately responsible for identifying and serving the needs and interests of his or her audience. Unless minorities are encouraged to enter the mainstream of the commercial broadcasting business, a substantial proportion of our citizenry will remain underserved and the larger, non-minority audience will be deprived of the views of minorities.' " 873 F.2d at 362-63 (opinion of Williams, J., concurring in part and dissenting in part) (emphasis in original) (quoting Federal Communications Commission, Minority Ownership Taskforce Report, Minority Ownership in Broadcasting 1 (May 17, 1978)).

There is plainly no claim of past discrimination. *Winter Park*, 873 F.2d at 353 n.6. Without question then, the minority preference policy fails the *Croson* requirement of specificity. "None of these 'findings,' singly or together, provide the [FCC] with a 'strong basis in evidence for its conclusion that remedial action was necessary.' There is nothing approaching a prima facie case of a constitutional or statutory violation by anyone in [the broadcast industry]." *Croson*, 102 L. Ed. 2d at 886.

Absent a finding of past discrimination, the first prong of the constitutional test for strict scrutiny cannot be satisfied. It is absolutely necessary that FCC proffer something to prove past discrimination. It did not do so and therefore the race-conscious remedy followed by FCC is unconstitutional.

C. Program Diversity Is Not a Compelling Governmental Interest Justifying a Race-Based Preference Program

FCC also attempts to justify its race-conscious program arguing that program diversity is a compelling governmental interest. To justify program diversity as a compelling governmental interest, FCC must show some basis for believing that minority ownership would lead to "minority programming."

While FCC's desire to promote program diversity may be a reasonable policy goal (*see Federal Communications Commission v. National Citizen's Committee for Broadcasting*, 436 U.S. 775 (1978)), it is not sufficient to create a compelling governmental interest justifying a race-based preference program. Both *West Michigan* and *Winter Park* treat FCC's program diversity goal as analogous to Justice Powell's discussion of academic diversity being tied to academic freedom in *Bakke*, 438 U.S. at 313. Yet the diversity interest discussed by Justice Powell in *Bakke* is much different from the program diversity interest advanced by FCC.

In *Bakke*, this Court struck down a university admission policy that set fixed goals for minority admissions. Only Justice Powell reached the constitutional issue and

found that the ability of the university to select a diverse student body under the values of the First Amendment may create a compelling state interest at least in the context of higher education. *Bakke*, 438 U.S. at 311-15 and 323 (Powell, J.). However, the First Amendment does not elevate FCC's program diversity or race-based preference policies to a compelling governmental interest. The plain meaning of the First Amendment requires the federal government to stay neutral, not to promote either diversity or conformity in the area of programming. Furthermore, while "the widest possible dissemination of information from diverse and antagonistic sources" may be a worthy goal of the First Amendment (*Associated Press v. United States*, 326 U.S. 1, 20 (1945)), that goal is to be achieved through a free marketplace of ideas and not through government fiat. *Office of Communication of the United Church of Christ v. Federal Communications Commission*, 707 F.2d 1413 (D.C. Cir. 1983). A goal of diversity of viewpoint does not mean that government is constitutionally obligated to take active steps to promote such opinions. *See Regan v. Taxation with Representation*, 461 U.S. at 546.

FCC has failed to make the necessary findings or any findings whatsoever to justify the use of minority preference to further its goal of attaining diverse broadcast programming. Given todays' regulation of the airwaves, such policy goals cannot satisfy stringent requirements of strict scrutiny.

Moreover, relying on program diversity to justify a race-conscious program increases the risk of racial stereotyping. Because of the holdings in *TV 9* and *Garrett*,

discussed above, FCC has made no attempt to establish a nexus between an owner's race and program diversity. The following language from *Steele v. Federal Communications Commission*, 770 F.2d at 1198, illustrates the preeminent danger in the use of racial classifications in justifying a minority preference program premised on program diversity:

> "The minority preference rests on the assumptions that first, membership in an ethnic minority causes members of that minority to have distinct tastes and perspectives and, second, that these differences will consciously or unconsciously be reflected in distinctive editorial and entertainment programming. . . .There is no reason to assume, for example, that an Italian station owner would primarily program Italian operas or would eschew Wagner in favor of Verdi. Similarly, it is questionable whether a black station owner would program soul rather than classical music or that he would manifest a distinctively 'black' editorial viewpoint. Indeed, to make such an assumption concerning an individual's tastes and viewpoints would seem to us mere indulgence in the most simplistic kind of ethnic stereotyping.
>
> . . . .
>
> "With respect to the second assumption, one would think that station owners--motivated primarily by the desire to turn a profit--would be more influenced in their programming decisions by the tastes, interests, and perspectives of the listening audience than by those tastes and perspectives perhaps attributable to their own ethnic backgrounds." *Id.* at 1198.

FCC has been unable to present any findings on which to base an assumption that a nexus exists between

an owner's race and program diversity. The *West Michigan* holding that FCC may rely on a "[r]easonable expectation" that minority owners are likely to increase diversity of content (*West Michigan*, 735 F.2d at 610) does not create a compelling governmental interest. In *Wygant*, this Court stated: "This Court has 'consistently repudiated "[d]istinctions between citizens solely because of their ancestry" as being "odious to a free people whose institutions are founded upon the doctrine of equality."' " *Wygant*, 476 U.S. at 273 (quoting *Loving v. Virginia*, 338 U.S. 1, 11 (1967)).

Recently, in *Croson*, Justice Stevens reiterated the impermissibility of racial stereotyping. He stated that "the Richmond City Council has merely engaged in the type of stereotypical analysis that is a hallmark of violations of the Equal Protection Clause." 102 L. Ed. 2d at 896 (Stevens, J., concurring).

This is exactly what FCC has done by relying on "reasonable expectations" without any supportive findings. "Absent such findings, there is a danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics." *Croson*, 102 L. Ed. 2d at 893. It is absolutely necessary for FCC to proffer something to justify a compelling governmental interest. It did not do so and therefore the race-conscious remedy is unconstitutional.

III

THE RACE-BASED PREFERENCE POLICY IS NOT NARROWLY TAILORED

Assuming, *arguendo*, that there is a compelling governmental interest to justify the race-conscious

preference, the plan must be narrowly tailored to the remedial purpose. *Croson*, 102 L. Ed. 2d at 890; *Wygant*, 476 U.S. at 274; *Fullilove*, 448 U.S. at 480. A racial preference plan must allow for a case-by-case consideration of the applicants to ensure that each minority business has in fact suffered from the effects of past discrimination. *Croson*, 102 L. Ed. 2d at 891; *Fullilove*, 448 U.S. at 486-87. The remedy must be structured in such a way that it minimizes the burden on nonminorities. *Wygant*, 476 U.S. at 282-84; *Fullilove*, 448 U.S. at 514-15 (Powell, J., concurring).

Additionally, in *Wygant* the plurality opinion noted that the term "narrowly tailored" as used in Supreme Court cases has acquired a secondary meaning; specifically, the term may be used to require consideration of whether lawful alternatives and less restrictive means could have been used. That is, the classification at issue must "fit" with greater precision than any alternative means. *Id.* at 280 n.6. FCC's race-based program does not conform to the strictures of the Constitution because it is not narrowly tailored.

First, the minority preference policy is not narrowly tailored to remedy past discrimination. Congress and FCC did not require the minority preference to be tied to a minority owner who has suffered any disadvantage. Instead, FCC's race-conscious program is based on two court decisions and unverified premises and assumptions that minority ownership will foster program diversity. As this Court found in *Croson*, it is almost impossible to determine whether a program is narrowly tailored when it is not linked to identified discrimination in any way. *Id.* at 890.

Second, Congress and FCC did not consider the use of race-neutral means to increase minority ownership of broadcast stations and to foster program diversity. *See id.* If FCC proceeded on a case-by-case basis to determine the applicant's programming views, there would be no need to employ a race-based preference.

Third, the minority preference policy imposes an unfair burden on innocent third parties. Unlike *Fullilove*, in which this Court found the "actual 'burden' shouldered by nonminority firms is relatively light" (448 U.S. at 484), the substantial preference or enhancement given to minority applicants in a comparative hearing for a broadcast station imposes an insurmountable burden on the nonminority applicant. It deprives him of a unique opportunity to own a broadcasting station, solely because of his race.

In sum, the race-conscious preference policy lacks any of the indicia of narrow tailoring.

CONCLUSION

When the government distributes benefits under a race-conscious program, it rejects the concern for the individual that forms the basis of a free society. Such programs make members of favored classes eligible for preferential treatment regardless of whether they personally have been disadvantaged; while at the same time these programs in their arbitrariness exclude others who may have been subject to equally onerous burdens.

The equal protection guaranty protects all equally. Any race-based program designed by the government must overcome the strict scrutiny standard of review. The only compelling governmental interest sufficient to meet this burden is remedying identified acts of discrimination. Then, a race-based remedy must be narrowly tailored. The remedy must fit the actual wrong and a race-based program must be used only as a last resort. The minority preference applied by FCC in its comparative hearing process is clearly inconsistent with a society dedicated to equal opportunities. Using the strict scrutiny standard provides enhanced protection against the unfocused use of blunt, race-based devices. Amicus, Pacific Legal Foundation, therefore urges that the decision of the Court of Appeal for the District of Columbia Circuit be reversed.

DATED: February, 1990.

Respectfully submitted,

RONALD A. ZUMBRUN
ANTHONY T. CASO
*SHARON L. BROWNE
*Counsel of Record
Pacific Legal Foundation
2700 Gateway Oaks Drive,
Suite 200
Sacramento, California 95833
Telephone: (916) 641-8888

Attorneys for Amicus Curiae,
Pacific Legal Foundation